

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

---

PROMETHEUS RADIO PROJECT,

Petitioners,

No. 03-3388, et al.

v.

FEDERAL COMMUNICATIONS COMMISSION,  
and UNITED STATES OF AMERICA,

Respondents.

---

**RESPONSE, AND REQUEST FOR AFFIRMATIVE  
RELIEF, OF MMTC ET AL. CONCERNING TRIBUNE  
COMPANY'S MOTION FOR PARTIAL LIFTING OF STAY**

Pursuant to Fed. R. App. P. 27(a)(3), MMTC et al. ("MMTC")<sup>1/</sup> respectfully responds to the July 22, 2004 motion of Tribune Company for a partial lifting of this Court's stay of the FCC's cross-ownership rules. Affirmative relief is also respectfully sought pursuant to Fed. R. App. P. Rule 27(a)(3)(B); see p. 6 infra.

As shown herein, Tribune's motion should not be granted as styled, because

---

<sup>1/</sup> Minority Media and Telecommunications Council, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF-Institute for Puerto Rican Policy, UNITY: Journalists of Color, Inc., and Women's Institute for Freedom of the Press. MMTC is authorized to state that the views presented herein also represent the views of petitioners National Association of Black Owned Broadcasters and Rainbow/PUSH Coalition.

the Court has mandated that deregulatory steps should be taken only upon careful examination of their impact on minority ownership. However, if the Court were disposed to favor the ultimate relief Tribune seeks, the Court should state that it would be amenable to partially lifting the stay if the FCC, on remand, evaluates the specific potential impact on minority ownership that could be presented by large-market crossownership,<sup>2/</sup> and takes reasonable steps to mitigate any substantial adverse impact.

In 1999 (and on many other occasions), the FCC promised to “expand opportunities for minorities and women to enter the broadcast industry.” Review of the Commission’s Rules Governing Television Broadcasting (R&O), 14 FCC Rcd 12903, 12910 ¶14 (1999) (subsequent history omitted). In the Order reviewed in this case, the FCC acknowledged that minority and female ownership diversity was one of the five types of diversity it sought to advance through its structural regulations.<sup>3/</sup> Thus, when it considered whether the FCC acted reasonably in repealing its Failing Station Solicitation Rule (“FSSR”),<sup>4/</sup> the Court concluded:

---

<sup>2/</sup> It is not clear whether large-market crossownership is to be distinguished from medium market crossownership at the nine-station level, as recommended by Tribune. Other parties will debate that point in their respective papers. This seems to be a fact question best determined by the Commission on remand.

<sup>3/</sup> 2002 Biennial Regulatory Review - Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd 13620, 13627 ¶18 (2003) (“Order”), JA0044.

<sup>4/</sup> 47 C.F.R. §73.3555 n. 7 (which requires a duopoly waiver applicant to provide notice of the sale to potential out-of-market buyers before it can sell a failed, failing, or unbuilt station to an in-market buyer.) The FCC had created the FSSR to ensure that qualified minority broadcasters had a fair chance to learn that duopoly-eligible stations were for sale. See Prometheus Radio Project v. FCC, No. 03-3388 et al. (3d Cir., June 24, 2004) (“Slip Op.”) at 94.

By failing to mention anything about the effect this change would have on potential minority station owners, the Commission has not provided “a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.” Greater Boston TV Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) . . . . In repealing the FSSR without any discussion of the effect of its decision on minority television station ownership (and without ever acknowledging the decline in minority station ownership notwithstanding the FSSR), the Commission “entirely failed to consider an important aspect of the problem,” and this amounts to arbitrary and capricious rulemaking.” State Farm, 463 U.S. at 43; see also Copps Dissent, 18 F.C.C.R. at 13,970-71 (chastising the Commission for “fail[ing] to conduct rigorous analysis of today’s rules on minorities and women); Adelstein Dissent, 18 F.C.C.R. at 13,997 (same). For correction of this omission, we remand.

Slip Op. at 95-96 (fns. omitted).<sup>5/</sup>

If this holding left any doubt whether the FCC could remove ownership protections without considering the impact on minority ownership, the Court emphasized that

[r]epealing its only regulatory provision that promoted minority television station ownership without considering the repeal’s effect on minority ownership is also inconsistent with the Commission’s obligation to make the broadcast spectrum available to all people “without discrimination on the basis of race.” 47 U.S.C. §151.

Slip Op. at 96 n. 58.

Finally, the Court underscored that consideration of minority ownership in structural regulation is not limited just to avoiding extreme scenarios where no policy at all protects minority ownership. In particular, noting that the FCC had

---

<sup>5/</sup> The Court’s citations are to Motor Vehicle Mfgs. Ass’n. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1982), Order, 18 FCC Rcd at 13970-71 (2003) (Dissenting Statement of Commissioner Michael J. Copps), JA-0386-0387, and id. at 13997 (Dissenting Statement of Commissioner Jonathan S. Adelstein), JA0416.

deferred consideration of fourteen MMTC proposals for new minority ownership policies,<sup>6/</sup> the Court directed that “[t]he Commission’s rulemaking process in response to our remand order should address these proposals at the same time.” Slip Op., p. 96; see also id. at 124-25 n. 82 (to the same effect).<sup>7/</sup>

It follows that before the relief sought by Tribune could be implemented, someone – the Court or the FCC – should evaluate the extent and nature of such injury to minority ownership as could arise if the crossownership ban were lifted. Such a determination is fact-based, and thus it should be rendered by the FCC on remand. In such remanded proceedings, MMTC would demonstrate that at least fifteen minority owned companies are planning or attempting to distribute fulltime multicultural, Spanish or other non-English language program services through over-the-air, cable or satellite platforms. Further, MMTC would show that in the most cost-effective and accessible platform -- over-the-air television – these multicultural and language-based program services require access to several large television markets. For example, an over-the-air Chinese, Japanese or Korean language television service is feasible if stations are available in New York, Los Angeles, San Francisco, Seattle and Honolulu – markets all impacted by Tribune’s

---

<sup>6/</sup> Some of these proposals had already been deferred for many years – one of them since 1990. See MMTC Main Brief (filed October 21, 2003) at 7-8.

<sup>7/</sup> On the question of whether the FCC should consider narrowly tailored but race-conscious initiatives such as those aimed at assisting socially and economically disadvantaged businesses (“SDBs”), the Court stated that it anticipated “that by the next quadrennial review the Commission will have the benefit of a stable definition of SDBs, as well as several years of implementation experience, to help it reevaluate whether an SDB-based waiver [of the transferability of pre-existing noncompliant consolidations] will better promote the Commission’s diversity objectives.” Slip Op. at 110 n. 70.

motion. Finally, MMTC would demonstrate that multicultural and language-based fulltime program services are unlikely ever to be available on stations crossowned with local newspapers, but they are quite likely to be broadcast on minority owned stations.

The record before this Court shows that minority broadcasters labor under a lack of access to capital,<sup>8/</sup> as well as a lack of awareness that potential deals are even available to qualified buyers.<sup>9/</sup> Thus, absent carefully tailored relief, the sudden availability of perhaps dozens of large market television stations to local newspapers could preclude minority ownership of many of these highly desirable properties. Given their financial wherewithal and operating synergies, newspapers would outbid most other potential buyers for same-market television stations.

However, minorities' disadvantages in access to capital and opportunity can be overcome or substantially ameliorated. For example, the FCC could extend the FSSR to stations that might be subject to crossownership. It could also grandfather the nonattribution of "equity/debt plus" (EDP) interests in stations owned by disadvantaged businesses – a powerful incentive to draw capital, and the expertise and partnership of long-established broadcast companies, to minority owned and other disadvantaged ventures.<sup>10/</sup>

MMTC is confident that the FCC has the expertise to evaluate this subject and adopt tailored remedies by the conclusion of this year. If the Court chooses to remand the matter, it should require expeditious consideration of both the crossownership and minority ownership issues.

---

<sup>8/</sup> See Initial Comments of Diversity and Competition Supporters (MMTC et al.), MB Docket 02-277 (filed January 2, 2003) at 32-33, JA4326-4327.

<sup>9/</sup> See id. at 117-118, JA4401-4402.

<sup>10/</sup> See MMTC Main Brief at 23-25.

In conclusion, if the Court is disinclined to favor Tribune's motion, it should deny the motion and do nothing more. However, if the Court is inclined to favor the ultimate relief Tribune requests, it should remand to the FCC with instructions to expeditiously consider the extent and nature of large market crossownership on minority ownership, and to design and implement such corrective steps as may be necessary. Thereupon the FCC should report to this Court and, in that scenario, unless it were shown that the FCC's corrective steps were plainly unreasonable, the Court could partially lift the stay as urged by Tribune.

Respectfully submitted,

/s/

---

David Honig  
Minority Media and Telecommunications Council  
3636 16th Street N.W. #B-366  
Washington, D.C. 20010  
(202) 332-7005  
dhonig@crosslink.net

*Counsel of Record for Minority Media and  
Telecommunications Council, American Hispanic Owned  
Radio Association, Civil Rights Forum on  
Communications Policy, League of United Latin  
American Citizens, Minority Business Enterprise Legal  
Defense and Education Fund, National Asian American  
Telecommunications Association, National Association of  
Latino Independent Producers, National Coalition of  
Hispanic Organizations, National Council of La Raza,  
National Hispanic Media Coalition, National Indian  
Telecommunications Institute, National Urban League,  
Native American Public Telecommunications, Inc.,  
PRLDEF-Institute for Puerto Rican Policy, UNITY:  
Journalists of Color, Inc., and Women's Institute for  
Freedom of the Press*

August 13, 2004

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of August, 2004, I caused one copy of the foregoing "Response," to be served first-class mail, postage prepaid, upon the following parties:

Michael D. Hays  
John R. Feore, Jr.  
M. Anne Swanson  
Theodore L. Radway  
Dow, Lohnes & Albertson, PLLC  
1200 New Hampshire Avenue N.W.  
Suite 800  
Washington, DC 20036-6802

*Counsel for Media General, Inc., Millcreek  
Broadcasting, Paxson Communications  
Corp. and Simmons Media Group*

Catherine G. O'Sullivan  
Nancy C. Garrison  
U.S. Department of Justice  
Antitrust Division  
Patrick Henry Bldg.  
601 D Street N.W. Room 10353  
Washington, DC 20530

*Counsel for United States of America*

Donald B. Verrilli, Jr.  
Ian Heath Gershengorn  
Jenner & Block, LLC  
601 Thirteenth Street N.W.  
Washington, DC 20005

Jack N. Goodman  
National Association of Broadcasters  
1771 N Street N.W.  
Washington, DC 20036

*Counsel for National Association of  
Broadcasters*

John Rogovin  
General Counsel  
Federal Communications Commission  
Room 8-A741  
445 12<sup>th</sup> Street S.W.  
Washington, DC 20554

*Counsel for the Federal Communications  
Commission*

Robert A. Long, Jr.  
Jennifer A. Johnson  
Covington & Burling  
1201 Pennsylvania Avenue N.W.  
Washington, DC 20004-2401

*Counsel for the CBS Television  
Network Affiliates Association, the  
NBC Television Affiliates, and the  
Network Affiliates Stations Alliance*

Wade H. Hargrove  
Mark J. Prak  
Brooks, Pierce, McLendon, Humphrey  
& Leonard  
1600 Wachovia Capitol Center  
150 Fayetteville Street Mall  
Raleigh, NC 27601

*Counsel for the ABC Television  
Affiliates Association and the Network  
Affiliated Stations Alliance*

Andrew Jay Schwartzman  
Media Access Project  
Suite 1118  
1625 K Street N.W.  
Washington, DC 20006

Samuel L. Spear  
Spear Wilderman Borish Endy Spear & Runckel  
Suite 1400  
230 South Broad Street  
Philadelphia, PA 19102

*Counsel for the Prometheus Radio Project  
et al.*

Jerome M. Marcus  
Berger & Montague, P.C.  
1622 Locust St.  
Philadelphia, PA 1910-03-6305

Dianne Smith  
Special Projects Counsel  
Capitol Broadcasting Co., Inc.  
2619 Western Blvd.  
Raleigh, NC 27606

*Counsel for Capitol Broadcasting  
Company, Inc.*

Angela J. Campbell  
James A. Bachtell  
Citizens Communications Center  
Project  
Institute for Public Representation  
Georgetown University Law Center  
600 New Jersey Avenue, N.W.  
Washington, DC 20001

*Counsel for Media Alliance and Office of  
Communication of the United Church of  
Christ, Inc.*

Michael K. Kellogg  
Mark L. Evans  
Kellogg, Huber, Hansen, Todd &  
Evans, P.L.L.C.  
1615 M Street, N.W.  
Suite 400  
Washington, DC 20036

Lawrence Tu  
Susan Weiner  
National Broadcasting Company,  
Inc.  
30 Rockefeller Plaza  
New York, NY 10112

F. William LeBeau  
National Broadcasting Company, Inc.  
1299 Pennsylvania Ave. N.W.  
Washington, DC 20004

*Counsel for National Broadcasting  
Company, Inc. and Telemundo  
Communications Group, Inc.*

Shelby D. Green  
Pace University School of Law  
78 N. Broadway  
White Plains, NY 10603

*Counsel for the National Council of the  
Churches of Christ in the United States*

Henk Brands  
Patrick S. Campbell  
Paul, Weiss, Rifkind, Wharton  
& Garrison LLP  
1615 L Street N.W.  
Suite 400  
Washington, DC 20036

*Counsel for Fox Entertainment  
Group, Inc., Fox Television Stations,  
Inc., and Viacom, Inc.*

Ellen S. Agress  
The News Corporation Limited  
1211 Avenue of the Americas  
New York, NY 10036

Maureen A. O'Connell  
The News Corporation Limited  
444 N. Capitol Street N.W.  
Suite 740  
Washington, DC 20001

*Counsel for Fox Entertainment  
Group, Inc., and Fox Television  
Stations, Inc.*

John F. Sturm  
President and Chief Executive Officer  
Newspaper Association of America  
1921 Gallows Road  
Suite 600  
Vienna, VA 22182-3900

*Counsel for the Newspaper Association of America*

James Winston  
Rubin Winston Diercks Harris & Cooke LLP  
1155 Connecticut Ave. NW, 6th fl.  
Washington, DC 20006

*Counsel for the National Association of Black  
Owned Broadcasters and the Rainbow/PUSH  
Coalition*

Michael D. Fricklas  
Mark C. Morril  
Viacom Inc.  
1515 Broadway  
New York, NY 10036

*Counsel for Viacom Inc.*

Kathryn R. Schmeltzer  
Barry H. Gottfried  
Paul A. Cicelski  
Scott R. Flick  
Brendan Holland  
Christopher J. Sadowski  
Shaw Pittman LLP  
2300 N Street N.W.  
Washington, DC 20036

*Counsel for Sinclair Broadcast Group, Inc.  
and Univision Communications, Inc.*

David P. Fleming  
General Counsel, Gannett Broadcasting  
Gannett Co., Inc.  
7650 Jones Branch Drive  
McLean, VA 22107

*Counsel for Gannett Co., Inc.*

Guy Kerr  
Senior Vice President/Law and Government  
& Secretary  
Belo Corp.  
400 South Record Street  
Dallas, TX 75202

*Counsel for Belo Corp.*

James R. Bayes  
Richard J. Bodorff  
John E. Fiorini, III  
Kathleen A. Kirby  
Helgi C. Walker  
Eve Klindera Reed  
Wiley Rein & Fielding LLP  
1776 K Street N.W.  
Washington, DC. 20006

*Counsel for the Newspaper Association of America, Gannett Co., Inc., Belo Corp., Morris Communications Company, LLC, Emmis Communications Corporation, and Clear Channel Communications, Inc.*

Paul C. Besozzi  
Stephen Diaz Gavin  
Patton Boggs LLP  
2550 M Street N.W.  
Washington, D.C. 20037

Timothy R. Smith  
Nassau Broadcasting Holdings, Inc.  
Nassau Broadcasting II, L.L.C.  
619 Alexander Road, 3rd fl.  
Princeton, NJ 08540

*Counsel for Nassau Broadcasting II, L.L.C. and Nassau Broadcasting Holdings, Inc.*

Carter Phillips  
R. Clark Wadlow  
Richard Klinger  
Jim Young  
Anita Wallgren  
Sidley Austin Brown & Wood  
1501 K Street N.W.  
Washington, DC 20005

*Counsel for Tribune Co.*

David A. Irwin  
Alan C. Campbell  
Jason S. Roberts  
Irwin, Campbell & Tannenwald, P.C.  
1730 Rhode Island Ave. N.W.  
Suite 200  
Washington, DC 20036-3101

*Counsel for Sunbelt Communications Company, Diversified Communications, Press Communications, LLC, and Family Stations, Inc.*

Glenn B. Manishin  
Stephanie A. Joyce  
Kelley Drye & Warren LLP  
8000 Towers Crescent Drive  
Suite 1200  
Vienna, VA 22182

Rachel Weintraub  
Assistant General Counsel  
Consumer Federation of America  
1424 16th Street N.W.  
Suite 604  
Washington, D.C. 20036

Gene Kimmelman  
Senior Director of Public Policy and Advocacy  
Consumers Union  
1666 Connecticut Ave. N.W.  
Suite 310  
Washington, D.C. 20009-1039

*Counsel for Consumer Federation of America and Consumers Union*

/s/

---

David Honig